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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 642

PHILIP SAXNER and RUBIN SAXNER doing business as PHIL'S TAVERN, and CHICAGO'S LAST DEPARTMENT STORE, an Illinois corporation,

Petitioners,

vs.

MARY ANN WAYNICK, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the Honorable, The Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Now come the respondents-plaintiffs below, Mary Ann Waynick, Wilma Ann Scruggs, Carl Mack Waynick, a minor, by Mary Ann Waynick, his mother and next friend, Linda Kay Waynick, a minor, by Mary Ann Waynick, her mother and next friend, Nellie Sue Waynick, a minor, by Mary Ann Waynick, her mother and next friend, and Alice Fay Waynick, a minor, by Mary Ann Waynick, her mother and next friend, and in opposition to the Petition for a Writ of Certiorari filed by the defendants, Philip Saxner and Rubin Saxner and Chicago's Last Department Store, an Illinois corporation, respectfully request this Honorable Court to deny said Petition.

For the purpose of clarity and brevity, the respondents will follow the general outline selected by the petitioners

AS TO THE JURISDICTION OF THIS COURT.

The respondents acknowledge the jurisdiction of this Court with respect to the considerations contained in the Petition as presented to this Court.

AS TO THE QUESTION PRESENTED.

Under this heading the defendants have portrayed the decision of the Circuit Court of Appeals as standing for the proposition that there is a common law right of action against a vendor of liquor who sells to an intoxicated vendee, in violation of a penal statute, in favor of those injured by the intoxication of the vendee, in jurisdictions which have dram shop or civil damage statutes. The respondents view this interpretation of what the Court of Appeals decided as far too broad in scope, in that every decision must be uttered in the light of the facts upon which that decision is rendered. It would appear that the decision rendered below was guided by the significant considerations that the liquor in question was sold and consumed in Illinois and the injury proximately flowing from such sale and consumption culminated in Michigan; that neither the Illinois statutes nor the Michigan statutes which concern themselves with dram shop or civil damage recoveries could be interpreted as covering a situation as existed in the instant case; that upon the common law principle that for every wrong there ought to be a remedy the court applied that principle to permit recovery. Likewise the petitioners in sensitizing the "common law right of action" to the "violation of a penal statute" ignored the relationship of that violation to those considerations of "due or ordinary care" and negligence as viewed by the common law.

AS TO THE STATUTES INVOLVED.

In addition to the statutes cited under this topic at Pages 2 and 3 of the Petition for Writ of Certiorari as well as the statutes as set forth in full in Appendix E and F of that Petition, another statute mentioned by the petitioners at Page 9 and Footnote 7 is worthy of quotation, namely Section 290, Act 388 of Public Acts of Michigan, 1917, as amended, Section 18.1000 of Michigan Stat. Annot., page 455, Vol. 13, which is as follows:

> "Gifts; sales to intoxicated person. Sec. 29. No vendor shall give away any alcoholic liquor of any kind or description at any time in connection with his business except manufacturers for consumption on the premises only. No vendor shall sell any alcoholic liquor to any person in an intoxicated condition. (C.L. '48, 436.29.)"

AS TO THE STATEMENT OF THE CASE.

Respondents take no issue with the statement as outlined by the Petitioners except that they call the Court's attention to the interstate character of the occurrence, namely the sale of liquor in Illinois to persons already intoxicated and the ultimate collision by the automobile operated by those intoxicated persons with the automobile in which the plaintiffs were riding in the State of Michigan resulting in the decimation of two families by death and injuries. This feature is further illustrated by the allegations in the Complaint against Chicago's Last Department Store, one of the petitioners, wherein it was stated that the liquor store's location near the Illinois boundary line and its proximity to the highway emphasized the gravity in selling liquor to those already intoxicated, where it was apparent that their automobile will be operated in interstate travel. The respondents also differ

with the interpretation of the petitioners as regards the decision in the Court of Appeals whereby the petitioners limit the impact of the Court's decision as being wholly dependent upon the violation of Sec. 131 of Illinois Liquor Control Act for the total cause of action. The respondents in their reading of the decision interpret the Court's reference to that section as indicative of the duty or standard that the common law would impose upon one selling intoxicating liquor to a person already intoxicated and that such a sale is violative of the "general duty to use due or ordinary care not to injure others, to avoid injury to others by any agency set in operation by him".

The court went on to state that "in applying the common law to the situation presented in this case, we must consider the law of tort liability, even though the chain of events which started when the defendant tavernkeeper unlawfully sold intoxicating liquor to two drunken men crossed state boundary lines and culminated in the tragic collision in Michigan."

AS TO THE REASONS RELATED FOR GRANTING THE WRIT.

The petitioners exhort this Court to grant the Petition for a Writ of Certiorari on the following dichotomy:

1. "This is a case of novel impression."

2. "The cases are overwhelmingly to the effect that in the common law it is not considered a tort to sell intoxicating liquor to ordinary able-bodied men and that there is no cause of action against a vendor of liquor in favor of those injured by the intoxication of the vendee."

These headings belie the propositions advanced in support of them. To attack the morass of citations and

propositions advanced by the petitioners would extend this response beyond its function. The most significant intimation of the petitioners is that in some manner the Court of Appeals failed in its obligation to follow the rule laid down by *Erie Railroad Company* v. *Tompkins*, 304 U.S. 64, 58 Sup. Ct. 817, namely that no federal common law exists in diversity cases and that the Federal Court must apply the substantive law of the state in which the Federal Court sits. Such an application of the substantive law requires the Federal Courts to apply the conflict of laws rule of the state in which it sits as it affects the fact situation under scrutiny. In the Case of *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487, 85 L. Ed. 1477, 61 Sup. Ct. 1020, the Court declared:

> "We are of opinion that the prohibition declared in *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 82 L. Ed. 1188, 58 Sup. Ct. 817, 114 A. L. R. 1487, against such independent determinations by the federal courts extends to the field of conflict of laws. The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware state courts. Otherwise the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side. Any other ruling would do violence to the principle of conformity within a state upon which the Tompkins decision is based."

In the *Waynick* Case the collision of the vehicle operated by the intoxicated person and the vehicle in which the plaintiffs were riding occurred in Michigan.

Under Illinois law it is undisputed so far as the conflict of laws question is concerned that Illinois will apply the law of the place where the tort occurred. When the Illinois Supreme Court was faced with such a question they de-

clared in the case of *Mithen* v. *Jeffery*, 259 Ill. 372 at page 376, 102 N.E. 778.

> "The injury to the plaintiff occurred in the State of Wisconsin and the rights and duties of the parties were to be determined by the laws of that state which regulated their relations to each other."

To the same effect are the cases of *Christiansen* v. *William Graver Tankworks*, 223 Ill. 142, 79 N.E. 97, *Opp* v. *Pryor*, 294 Ill. 538, 128 N.E. 580.

Therefore, a Federal Court sitting in Illinois and following the rule of law applicable in Illinois would be under an obligation to apply the common law of the State of Michigan in determining the relative rights, obligations and duties of the parties to the action. This is precisely what the Court of Appeals did.

It is equally basic that where acts or omissions occur in one state and the injury occurs in another, the law of the state where the injury was inflicted will command. This is precisely what the Court of Appeals did.

The question is broadly discussed in The American Law Reports, Volume 133 beginning at page 263, and where it is stated:

> "Where the question relates to the choice between the law of the place where the negligent act or omission took place and the law of the place where the injury or death or both were inflicted, by the almost unanimous consensus of decision the place of the tort, within the contemplation of the rule that the law of the situs of the tort governs the liability and substantive matters, is the place where the injury or death was inflicted and not the place where the negligent act or omission took place."

The cases of *Hunter, Admr.* v. *Derby Foods, Inc.*, 110 F.2d 970, 972, 133 A.L.R. 255, 258; *Alabama Great South*

ern R. Co. v. *Carroll*, 97 Ala. 126, 11 So. 803; *Cameron* v. *Vandergriff*, 53 Ark. 381, 13 S.W. 1092; *El Paso and N.W. Ry. Co.* v. *McComas* (1903 Tex. Civ. App.), 72 S.W. 629; *Conn. Valley Lumber Co.* v. *Maine Central R.R.*, 78 N.H. 553, 103 A. 263; and *Darks* v. *Scudders-Gale Grocer Co.*, 146 Mo. App. 246, 130 S.W. 430, affirmed, 153 S.W. 1199, exemplify this rule.

The barren declaration of the petitioners that the Illinois conflict of laws rule is to the contrary without citation of any Illinois cases to support their position, does not alter the impact of the law and its application in this case.

Next under the Erie doctrine it has been held that in the absence of any decision by the State Supreme Court that if the Appellate Courts of that state have passed upon the question, the Federal Courts are obliged to follow their decision. *West* v. *American Telephone and Telegraph Co.*, 311 U.S. 223, 236, 237, 61 Sup. Ct. 170, 183, 85 L.Ed. 139, 132 A.L.R. 956. The Supreme Court further indicated in the case of *King* v. *Order of Travelers*, 333 U.S. 153, 92 L.Ed. 608, 68 Sup. Ct. 488 that where neither the State Supreme Court nor State Appellate Courts have spoken, Federal Courts are not necessarily bound by the state trial courts. Further, in the wake of the *Erie* case, where neither the State Supreme Court nor the State Appellate Courts have decided the precise question facing the Federal Court, the duty devolves upon that Court to examine the state law in general and apply it to the facts at hand. *Meridith* v. *City of Winter Haven*, 320 U.S. 228, 234, 64 Sup. Ct. 70, 88 L.Ed. 9, *Forsgren* v. *Gillioz*, 110 F.Supp. 647, 651.

All of this the Court did in the instant case. It inspected and applied the common law of Michigan and

gleaned from it the rule that "there is a general principle of the common law, that whenever the law gives a right or prohibits injury, it also gives a remedy by action; . . ." citing *Stout* v. *Keyes*, Michigan 2 Doug. 184, 43 Am. Dec. 465 at 467. It then fathomed the purport of the common law and declared that "every person has a general duty to use due care or ordinary care not to injure others . . .". In evaluating the duty that was owed by the petitioners to the respondents the Court related that in the very state where the sale occurred that sale was unlawful and as such violated the social and legal conception of what constituted reasonable care and due caution. The Court of Appeals declared in essence, that the defendants were guilty of a common law tort and that under the common law, actionable negligence is the failure of one owing a duty to another to do what a reasonable and prudent person would ordinarily have done under the circumstances, or doing what such a person would not have done, which omission or commission is the proximate cause of injury to another.

What gleanings do exist in Michigan law upon which the Court of Appeals has decided that a common law right of action exists in favor of the plaintiffs in the instant case?

The standard of wrongful conduct has since 1868 been defined by the Michigan Supreme Court in the case of *Detroit and Milwaukee Railroad Co.* v. *Van Steinburg*, 17 Mich. Rep. 99. There, in discussing the role of contributory negligence, the court defined negligence at page 118 as follows:

> "Negligence, as I understand it, consists in a want of that reasonable care which would be exercised by a person of ordinary prudence under all the existing

circumstances, in view of the probable danger of injury. The injury is, therefore, one which must take into consideration all these circumstances and it must measure the prudence of the party's conduct by a standard of behaviour likely to have been adopted by other persons of common prudence. Moreover, if the danger depends at all upon the action of any other person under a given set of circumstances, the prudence of the party injured must be estimated in view of what he had a right to expect from such other person and he is not to be considered blamable if the injury has resulted from the action of another which he could not reasonably have anticipated. Thus the problem is complicated by the necessity of taking into account the two sets of circumstances affecting the conduct of different persons, and is only to be satisfactorily solved by the jury placing themselves in the position of the injured person, and examining those circumstances as they then presented themselves to him, and from that standpoint judging whether he was guilty of negligence or not. It is evident that such a problem can not usually be one upon which the law can pronounce a definite sentence, and that it must be left to the sifting and determination of a jury."

The reverence with which this definition is held is exemplified by the recent Michigan Supreme Court opinion in the case of *Clark* v. *Shefferly*, 346 Mich. 332, 78 N.W. 2d. 155, at page 159 where the court declared:

"Van Steinburg gives us the very cynosure to the law of contributory negligence as originally adopted in this state. When we return to its course, much of our present difficulty with questions of law and fact assigned to contributory negligence will automatically disappear. Probably no Michigan case has been cited more universally, and followed with greater reverence, by the courts of the respective states and the courts of the United States, than Van Steinburg. It will do us no harm to partake again of its nourishment."

In the instant case where liquor was furnished by the defendants to persons already intoxicated, is it not want of due care to so furnish that liquor well knowing that the attributes that bespeak a careful driver have been destroyed and impaired by the drugging of the mind by alcohol? Is not the tortious conduct of the furnisher of alcohol to one already intoxicated the proximate cause of the injury suffered by those on the highway whose automobile was smashed by that of the drunkard? Is it not predictable? Is it not foreseeable? Can the wrongful conduct of the furnisher in such circumstances be destroyed by the negligence of the drunkard in operating his car when that negligence can be anticipated?

In discussing 'proximate cause' the Supreme Court of Michigan held in the case of *Parks* v. *Starks*, 342 Mich. 443, 70 N.W. 2d. 805, where nine hours prior to the injuries sustained by the plaintiff the defendant motorist had knocked out the supporting pillar of a canopy which ultimately fell upon the plaintiff. Said the Court, quoting from other authorities:

> "'The proximate cause of an injury is not necessarily the immediate cause; not necessarily the cause nearest in time, distance, or space. Assuming that there is a direct, natural and continuous sequence between an act and an injury * * * the act can be accepted as the proximate cause of the injury without reference to its separation from the injury in point of time or distance.'
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> * * *
>
> 'In order that the plaintiff may recover it must appear that his injury was the natural and probable consequence of a negligent act or omission of the defendant, which under the circumstances an ordinarily prudent person ought reasonably to have foreseen or anticipated might possibly occur as a result of such act or omission. * * *'".

Was not the furnishing of such liquor and its consequences foreseeable or to be anticipated in the present case?

Also of significance is the decision in *Berry* v. *Visser*, 354 Mich. 38, 92 N.W. 2nd 1 where the Court held at page 5, as follows:

> "'(3, 4) To this we add that requested jury instructions which, in their proposed application to a factual situation as at bar, do not take into account the element of foreseeability of a third party's negligence, are properly rejected. This merely complements the general rule that an intervening negligent act of a third person is not a superseding cause, if in the given case, the defendant at the time of his negligent conduct should have realized or anticipated that a third person might so negligently act or proceed. Such is the pith of Restatement, Torts, 447, pp. 1196, 1197; likewise the trend of the times. Professor James has recently written for us, under the title 'Practical Changes in the Field of Negligence' and under the heading 'Expanding Notions of What Is Foreseeable' (37 MSBJ, No. 8, August, 1958, pp. 10, 13):
>
> 'There has been an increasingly broad recognition of foreseeability of harm in situations where, at the turn of the century, courts were likely to deny negligence as a matter of law. Thus, there was formerly considerable reluctance to regard intervening wrongful or criminal acts as foreseeable in law, while today, most courts have no such reluctance where foreseeability is indicated as a matter of fact by the evidence."

The petitioners by their own admission confess that the question apparently has never been passed upon by any Michigan Court of review and refine from this the extraordinary postulate that such absence is an indication that

the applicable law of Michigan precludes a common law recovery in a fact situation such as we have here. Such a conclusion seems violative of all rules of reason for to imply that because the question was never raised, remembering that the sale of liquor to one already intoxicated in one state does not frequently produce injuries in another state resulting in litigation, no application of time tested common law principles can be made. Such an approach begs the question and chains the common law to a tree that never grows.

The petitioners contend in their brief, in effect, that the Court of Appeals had no right of determining what Michigan law was, in that it arrived at a conclusion diametrically opposed to settled law to the effect that "There was generally considered to be no remedy for damages against a vendor for liquor in states which had no civil damage statutes and that the cases are overwhelming to the effect that at common law it was not considered a tort to sell intoxicating liquor to ordinary able-bodied men." These contentions pinpoint the arguments of the petitioners to the direction not so much that the decision of the Court of Appeals was a case of novel impression or of federal significance so as to invite inspection by this Court but rather that the Court of Appeals in assessing the law and inspecting the general fundamentals of common law of Michigan was wrong. The defendants preferred to describe the decision of the Court of Appeals as one of "'compassion" for the plaintiffs' cause as opposed to being a lucid determination of what was right, what was fair, what was just, and what was the law under all of the circumstances in the case.

It is of sober significance that the Supreme Court of New Jersey on November 23, 1959, in evaluating the general principles of the common law as they applied in a

situation less imperative than the one in the instant case arrived at a decision four square and then some with the decision of the Court of Appeals in the *Waynick* case. In the case of *Rappaport* v. *Nichols*, 156 A. 2nd 1, the Supreme Court of New Jersey had before it a situation involving the plying of a minor with alcoholic beverages which resulted in the collision of the minor's car and the plaintiff's automobile. Parenthetically, it ought to be stated that the State of New Jersey had no civil damage act, the same having been repealed with the demise of Prohibition. The court at great length inspected cases such as those cited by the petitioners and the propositions for which they stand; it inspected "dutjes" and the cases connected therewith; it inspected "proximate causation" and the cases connected therewith; it inspected the general doctrines of negligence and concomitantly reasonable care and all due caution; it inspected regulations forbidding the sale of liquor to minors or to those who are intoxicated; it inspected the "burden" placed upon the industry; it inspected the *Waynick* case and commended its result. In short, it did what the petitioners ask this Court to do and it declared at Pages 8 and 9:

> "When alcoholic beverages are sold by a tavern keeper to a minor or to an intoxicated person, the unreasonable risk of harm not only to the minor or the intoxicated person but also to members of the traveling public may readily be recognized and foreseen; this is particularly evident in current times when traveling by car to and from the tavern is so commonplace and accidents resulting from drinking are so frequent . . . If the patron is a minor or is intoxicated when served, the tavern keeper's sale to him is unlawful; and if the circumstances are such that the tavern keeper knows or should know that the patron is a minor or is intoxicated, his service to him may also constitute common law negligence. In

view of the standard of conduct prescribed by the statute and the regulation a tavern keeper's sale of alcoholic beverages when he knows or should know that the patron is a minor or intoxicated may readily be found by the jury to be imprudent conduct. While the plaintiff here may introduce evidence that the defendants knew or should have known that Nichols was a minor, or intoxicated when served, and may avail herself of the violations of the statute and the regulations as evidence of the defendants' negligence, each of the defendants is at liberty to assert that it did not know or have reason to believe that its patron was a minor, or intoxicated when served, and that it acted as a reasonably prudent person would have acted at the time and under the circumstances . . ."

Thereby seven justices declared for a common law recovery with none opposed resulting in the reversal of the judgment below in favor of the tavernkeeper.

Common law recoveries have equally been allowed where intoxication was the precipitating cause of injury in the cases of *Pratt* v. *Daly*, 55 Ariz. 535, 104 P.2d. 147, *Swanson* v. *Ball*, 67 S.D. 161, 290 N.W. 482 and *Schelin* v. *Goldberg*, 188 P.A. Super. 341, 146 A.2d. 648.

The petitioners next attacked the utilization of Section 131 in connection with determining whether the act of selling intoxicated liquors to one already intoxicated constitutes an act which falls short of exercising due care and caution and in effect holding that such conduct may be inspected by a jury with respect to determining whether or not such a sale is or is not negligent under the qualities demanded by common law consideration. It is of no small significance that the legislature of Michigan as well as the legislature of Illinois found that the sale of liquor to one already intoxicated is an illegal act. Can it be said that the common law should impart a different quality of duty than those defined by the statutes by the

legislatures and should the common law be less demanding that such standards be maintained?

The petitioners seem to imply that the Court of Appeals did not have an opportunity in their final decision to consider the effect of the case of *Busser* v. *Noble*, 22 Ill. App. 2nd 443, 161 N.E. 2nd 150. An inspection of the pleadings in the United States Court of Appeals reveals that that Court's attention was called to the decision in the *Busser* case since the Busser Opinion was set forth in full in the Petition for Rehearing which Petition the Court denied. It ought be noted that the *Busser* case was not one determining either the interstate quality attendant in the present case nor was there in that case a milieu of "extraterritoriality" so that the plaintiff there would be denied any recovery. The Court in that case had no reason nor did it consider Section 131 from the standpoint of implying a duty. It only urged that the plaintiffs there had a recovery under the Illinois Dram Shop Act via Section 135, the consequence of which was that Section 131 was not available. The case of *Rogers* v. *Dwight*, 145 Fed. Supp. 537 upon which the *Busser* case relies stands on the same equation.

Next the defendants entertain the notion that the plaintiffs are not within the class of persons for whom Section 131 was designed and cite a bevy of cases none of which appear to have any real application. If the defendants were to cite any Illinois case concerning "classes" which a statute was supposed to protect, it ought have cited the case of *Ney* v. *Yellow Cab*, 2 Ill. 2d 74, 117 N.E. 2nd 74. In that case the Illinois Supreme Court examined the question of the violation of a "leaving a key in a car" statute as well as the elements of proximate cause as it is affected by a criminal act.

It found that the statute referred to, a part of the Uniform Traffic Act, was equally a public safety measure. Is not the enactment of Section 131 equally a public safety measure for in the sale of liquor to one who is intoxicated, there lurks the probability that, so deprived of his judgment, reason and reflexes necessary in the operation of an automobile, the intoxicated person will inflict injury upon members of the public. This decision further declared with respect to proximate causation and the flexibility of the common law at pages 81 through 84:

> "The common law has established itself in the history of jurisprudence because of its flexibility in its recognition of and adaptation to changing times and mores; and, as adopted by our legislature, 'is a system of elementary rules and of general declarations of principles, which are continually expanding with the progress of society adapting themselves to the gradual changes of trade, commerce, arts, inventions and the exigencies and usages of the country.' . . . Automobiles, once considered a luxury, are now considered by many to be a necessity. The man who once walked a mile now drives a block. The speed and power of automobiles have increased to the extent that safety experts are now showing keen awareness of their potentials even in the hands of rightful owners and careful operators. Incidents of serious havoc caused by runaway thieves or irresponsible juveniles in stolen or 'borrowed' motor vehicles frequently shock the readers of the daily press. With this background must come a recognition of the probable danger of resulting injury consequent to permitting a motor vehicle to become easily available to an unauthorized person through violation of the statute in question.
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>
> We are in agreement with the court below in our belief that reasonable men might differ on the question where there were special circumstances surrounding the defendant's violation of the statute which

may be the proximate cause of the damage that followed. We do not mean to be understood as holding that given a cause similar to the facts in the *Palsgraf* case we would hold otherwise than in the majority opinion; we do, however, believe that under the circumstances as presented in the case before us we find no persuasive authority and no impelling reasoning for this court to hold, as a matter of law, that no actionable negligence can exist."

The respondents suggest that these same compelling factors, even more dynamic and dangerous where an intoxicated person driving a car is involved, leads one to the unalterable conclusion that Section 131 sets a standard, a not unreasonable standard, the violation of which goes to the negligence of the petitioners in the sale of their liquor and these respondents may reasonably be presumed to be the beneficiaries of that standard of due care so pronounced.

The petitioners have proposed a line of argument as to the impact of the case on the liquor sales industry in that it greatly increases the risks and hazards of the business. As a corollary of such an approach choose to relate an argument which is de hors the record, namely, that they did not maintain insurance to cover the situation in question. The respondents have reason to believe that this representation is incorrect and that in fact the public liability policies of the petitioners afford them protection. However, in any event it occurs to the respondents that the existence or non-existence of insurance should not bear one whit upon a decision of this scope and character. It is respectfully submitted that the obtaining of an insurance policy is not the sole standard by which we protect our fellow men from our acts of negligence and that the standards and the responsibilities of our society can not be consigned to a conflict of indemnity. When the New

Jersey Supreme Court was faced with the proposition of "burden" in the case of *Rappaport v. Nichols*, 156 A.2d 1, it answered at Page 10:

> "We are fully mindful that policy considerations and the balancing of the conflicting interests are the truly vital factors in the molding and application of the common law principles of negligence and proximate causation. But we are convinced that recognition of the plaintiff's claim will afford a fairer measure of justice to innocent third parties whose injuries are brought about by the unlawful and negligent sale of alcoholic beverages to minors and intoxicated persons, will strengthen and give greater force to the enlightened statutory and regulatory precautions against such sales and their frightening consequences, and will not place any unjustifiable burdens upon defendants who can always discharge their civil responsibilities by the exercise of due care. It must be borne in mind that the plaintiff's complaint has no relation to service by persons not engaged in the liquor business or to lawful sales and service by liquor licensees, or to sales by reasonably prudent licensees who do not know or have reason to believe that the patron is a minor or is intoxicated when served; the allegations of the complaint are expressly confined to tavern keepers' sales and service which are unlawful and negligent. Liquor licensees who operate their business by way of privilege rather than as of right, have long been under strict obligation not to serve minors and intoxicated persons and if, as is likely the result we have reached in the conscientious exercise of our traditional judicial function substantially increases their diligence in honoring that obligation then the public interest will indeed be very well served."

CONCLUSION.

The respondents respectfully submit that the United States Court of Appeals arrived at a fair and just decision within the confines of those propositions announced in the case of *Erie Railroad Co.* v. *Tompkins* and those cases arising in its wake. The respondents respectfully submit that the Court of Appeals in applying the precepts of common law of the State of Michigan rendered honor to those conceptions, and in no way departed from them. The respondents respectfully submit that the decision of the Court of Appeals ought not be disturbed and that accordingly the petitioners be denied the relief which they seek in this Court.

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